that the Chargee-Respondent cannot shelter himself behind his nominee A.R.M.M. Meyappa Chettiar, and evade the plain duty which rests on him, as the beneficial owner of the other undivided half share in the lands, of contributing $10,000/- towards payment in full of the principal sum secured by the charge.

I agree that equitable principles should not be invoked too freely for the purpose of construing our Land Code, but surely a Chargor, who shows that there would be no need to sell his land if the chargee paid up in full what is due from himself in another capacity, has shown good and sufficient cause why the land should not be sold. Section 149 of the Land Code obviously contemplates that there may be cases in which charged land should not be sold, even though there has been a default in payment of the principal sum or interest thereon secured by the charge; and it seems to me that a chargor may "shew cause" either in law or equity against an application for an order for sale, and that the Courts should refuse to make an order in every case where it would be unjust to do so. By "unjust" I mean contrary to those rules of the common law and equity which are in force in the Federated Malay States.

For these reasons I think that the order for sale should be set aside and this matter remitted to the Court below, which will investigate the Appellant-Chargor's allegations in any way most convenient to itself and the parties, and do justice between them in accordance with its findings of fact on those allegations.

During the hearing of this appeal we heard a good deal of argument on the point as to whether an application by Originating Summons under Section 149 of the Land Code is a "Suit" within the meaning of that term as used in Section 5 of the Civil Procedure Code. In my opinion the point is covered by the decision of this Court in *V.R.K.R.S. Chettiappah Chettiar v. Raja Abdul Rashid Ibni Almerhum Sultan Idris,* F.M.S.L.R. Vol. 8 p. 345, which is an authority binding on us. I therefore hold that such an application is not a "Suit" to which Section 5 of the Civil Procedure Code applies.

Lastly, I agree with the order as to costs proposed by the learned President.

Murray-Aynsley, J.—I concur.

Appeal allowed. Matter remitted to Court below for trial of issues.

[ORIGINAL CIVIL JURISDICTION]

MURRAY-AYNSLEY, J.

July 8, 1938.

SITHAMBARAM CHETTYAR v. CHONG FATT.

[PERAK CIVIL SUIT No. 176 of 1936]*

Estoppel—application for sale of charged land—service of Originating Summons on Chargor—order made in default of appearance—sale—subsequent suit for balance due on charge—whether Chargor estopped from pleading infancy.

In 1928 the defendant charged a piece of land in favour of plaintiff. In 1933 the plaintiff applied by way of Originating Summons for the sale of the charged property. The defendant was served but he made default. The land was sold as a result of the proceedings. In a Suit by the plaintiff for the balance due under the charge, the defendant pleaded that he did not execute the charge or alternatively, that at the date of its execution he was an infant. It was alleged that the defendant was born in 1914. In his reply the plaintiff objected that the defendant was estopped from raising these defences by reason of the judgment in the proceedings instituted in 1933.

Held, that inasmuch as the defendant was an infant at the time of institution of the proceedings in 1933 and there was no guardian ad litem to represent him, nothing done or omitted by him in course of these proceedings could act as an estoppel.

Murray-Aynsley, J.—This case has come before me on a preliminary issue on a point of law namely whether Defendant is estopped from raising his defence by reason of a prior judgment between the parties.

The facts are peculiar. The Plaintiff is a Chettyar. On January 28th 1928 a piece of land was on the register in the name of the Defendant and a charge was executed in favour of the Plaintiff apparently by the Defendant. In 1933 the Plaintiff took proceedings by way of Originating Summons for the sale of the charged property. The Defendant was served but made default. As the result of the proceedings the land was sold; the Plaintiff sues for the balance due under the charge.

The defence now raised is substantially that the Defendant did not execute the alleged charge or in any event at the date of its execution he was a minor, it being alleged that the Defendant was born in the year 1914.

The Plaintiff replies that the Defendant is estopped from raising these defences owing to the judgment in the Originating Summons proceedings in the year 1933.

A statement of the law as to *Res Judicata* is found in Section 6 of the Civil Procedure Code. That Section is not applicable in this case as the scope of that section is limited to cases where the prior proceedings are a "suit" within the meaning of the

*An appeal was lodged, but it was later withdrawn. [Ed. M.L.J.]

Enactment. However, the Privy Council has decided in the case of *Ram Kirpal v. Rup Kuari* (6 Allahabad 269) that this section is not exhaustive and the binding force of such a judgment depends not upon Section 13 Act X of 1877 (which corresponds to Section 6 of the Civil Procedure Code) but upon general principles of law. This statement has been approved by the Privy Council in subsequent cases, but it does not help one to decide what principles should be applied. The doctrine of *Res Judicata* is based purely on convenience, that it is more important that there should be finalty in litigation than that injustice should be avoided in particular instances. I suppose that in most systems of law rules of procedure or of evidence give effect to the same underlying purposes but all such rules must by their nature be artificial and in English Law in particular the whole matter is very technical indeed, but in the absence of written law on the subject it is possible to apply English law or generalities embodying what may be considered to be the usual practice in civilized systems of Law.

As to the difficulty and danger of deciding a matter of this kind according to general principles and not according to any particular system of law I may quote the following instance.—One would imagine that one of the matters which is common to all systems of law was the acquisition of a title to immovable property by limitation. Actually in the F.M.S., this does not happen, similarly there may very well be a system of law which does not know the doctrine of *res judicata.* I am quite unable to see any reason of justice or convenience which extends the doctrine to cases where the former proceedings have gone by default or where by inadvertence or otherwise an issue was not contested and decided after due consideration.

In England the law on the subject is an instance of the doctrine of estoppel viz. estoppel by record and estoppel is part of the law of evidence, and is also peculiar to English law. Estoppel by record is an artificial doctrine and its incidents are based on the unreformed system of pleading. It is convenient at this stage to illustrate this by quoting the passage from *Hailsham* (Vol. 13 para. 500) dealing with estoppel by record where there has been default in pleading.—

> "A party who has suffered judgment in default of defence is not estopped from pleading in a later action matters not inconsistent with the material averments in the statement of claim in the earlier one, e.g., matters which might have been pleaded in confession and avoidance".

This distinction is artificial but it has apparently survived the abolition of the old system of pleading (*Humphries vs. Humphries* (1910) 2 K.B. 531), *Cooke vs. Rickman* (1911, 2 K.B. 1125).

The leading case on the subject is *Howlett v. Tarte* 10 C.B. (N.S.) 813. In the case of *Hoystead v. Taxation Commissioner* (1926) A.C. 155, its origin of the rule was explained but it actually had no application to that case and it still holds good. In applying the rule to the present case one would arrive at the following result (actually there were no pleadings but it is necessary to consider what the Plaintiff would have to allege if he had had a pleading). The Defendant is estopped from alleging facts in supporting a plea of *non est factum* but not from alleging infancy which would have been a matter of confession and avoidance. That would appear to be the English law on the subject. One would hesitate to apply anything so artificial to a country which has never known the old system of pleading but such is English law, and if English law is not to be applied what system should be applied?

A further complication arises from the age of the Defendant. At the time of the Originating Summons proceedings he appears to have been over the age of 18 and under the age of 21. The question of minority in this country is somewhat involved. For the purposes of the Land Code the age of majority for the Defendant is 18. For other purposes the age has been fixed by the Courts here as 21 *i.e.* for the Contract Enactment and the Civil Procedure Code. (*Kandasamy vs. Suppiah,* 1 F.M.S.L.R. 361). There appears to have been an exception in the case of Chinese under the Perak Order in Council 23 of 1893, which fixed the age at 18, (See *Teh Suan v. Ang Thuan,* 2 F.M.S. 43) but the Perak Order in Council in question was repealed by the Distribution Enactment 1929 without any saving clause, so I take it that the Defendant's age of majority apart from purposes of the Land Code was 21. That being so I think that there should have been a guardian *ad litem* in the Originating Summons proceedings in 1933. In point of fact there was none. I am therefore of the opinion that nothing done or omitted by him in the course of the 1933 proceedings can act as an estoppel.

It is not necessary for me to consider whether the Originating Summons proceedings were in order for the particular purpose for which they were instituted. What I decide is that nothing in them can effect the rights of the Defendant in other matters. I decide therefore that the Defendant is not estopped from proving any of the allegations in his defence.

Judgment accordingly.